No. 90-1014

In the Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. LEE, Individually and as Principal of Nathan Bishop Middle School, *et al.*,
Petitioners,

v.

DANIEL WEISMAN, *etc.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* *

Amicus Curiae Focus on the Family is a non-profit organization committed to strengthening the psychological and spiritual health of families in the United States and throughout the world. Focus on the Family's daily radio

* This brief is submitted with the written consent of both parties, filed with the Clerk of this Court.

broadcasts dealing with family issues reach more than one million listeners each day. Its monthly magazine has a circulation of 1.7 million.

Amicus Curiae Family Research Council, a division of Focus on the Family, acts as a voice for the pro-family movement in Washington, D.C., and provides policy analysis and research support for Focus on the Family. Both *amici* deal extensively with the interplay between schools, the family, and religious beliefs and traditions. *Amici's* publications and broadcasts seek to foster involvement of families with their children's schools, both public and private.

Among *amici's* supporters, listeners, and subscribers are thousands of families that send their children to public schools. *Amici* are at the forefront of the effort by these families to strengthen the public schools as institutions that educate and train children to be responsible, productive adults, and good citizens of this country. Such families expect the public schools to serve their proper role without undermining or counteracting the religious values of the family.

Amici and the families involved with and served by *amici* thus have a strong interest in how the federal judiciary polices the intersection between the school, the family, and religion. *Amici* are vitally concerned with how these issues are resolved in the context of public school graduation ceremonies. Such ceremonies are a time-honored event for families, undoubtedly the most significant family-centered event in any student's public school career. The involvement of the federal courts in prohibiting or allowing some forms of religious expression at graduation ceremonies has great potential either to preserve and strengthen the traditional bond between families and public schools, or to alienate families from the public schools.

STATEMENT OF THE CASE

The issue in this case is whether the Establishment Clause of the First Amendment to the United States Constitution prohibits prayer at graduation ceremonies held by public high schools and junior high schools.

For many years, public school graduation ceremonies in Providence, Rhode Island have included an invocation prayer and a benediction prayer offered by clergy of various faiths. The record in this case shows that prayers have been offered by representatives of a wide variety of the diverse religious traditions found in the Providence area (Respondent's Appendix A4-7). The prayers in this case were offered by a Jewish Rabbi, Leslie Gutterman, who invoked the name of God in the course of offering both the invocation and the benediction at the graduation ceremony of the Nathan Bishop Middle School on June 20, 1989.

A federal district court ruled that the graduation ceremony was conducted in violation of the Establishment Clause, because Rabbi Gutterman mentioned the name of God in the course of a public school function. *See Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990). The district court interpreted this Court's Establishment Clause decisions to mean that "God has been ruled out of public education as an instrument of inspiration or consolation." *Id.* at 70.

The U.S. Court of Appeals for the First Circuit considered the district court's opinion to be "sound and pellucid" and therefore affirmed it. *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990). This Court has now agreed to review that decision.

SUMMARY OF ARGUMENT

The Establishment Clause of the First Amendment was enacted 200 years ago, in tandem with the Free Exercise Clause, to protect religious liberty. Since that time, the concept of "separation of church and state" has sometimes eclipsed religious liberty as the guiding principle for interpreting and applying the Establishment Clause.

The decision below exemplifies how the "separation" concept, applied without regard to the religious heritage of the American people and without respect for the religious liberty values underlying the First Amendment, leads to government hostility toward religion. Religious expression is singled out for censorship in the public square. Religiously oriented families receive, in a uniquely pointed fashion, the message that their values cannot be acknowledged in a public function. And a long-standing custom of many public school districts, which has never manifested any danger of establishing religion, is needlessly struck down.

The district court's premise that "God has been ruled out of public education" would impose a forced secularization and send a powerful anti-religious message to students. Such an extreme approach is not required by this Court's decisions. On the contrary, the Supreme Court has allowed room for religious expression and belief within the walls of the public schools—most recently by upholding the Equal Access Act.

Amici submit that the nature and purpose of the public schools make it especially important to allow types of religious expression that do not involve government coercion or government promotion of religion. Schools that foster discussion about moral issues and goals in life should not be forced to pretend that such matters have no religious dimension—nor should students feel intimidated about expressing their religious beliefs concerning such matters. Schools that seek to make students aware of the rich and diverse heritage of cultural traditions in America should not be forced to censor those that have a religious foundation or aspect. Pluralism and openness, not censorship and secularism, should be the hallmark of public schools.

The invocation and benediction at the graduation ceremony in this case are harmless, non-coercive ways for public schools to acknowledge the religious heritage of the American people. By allowing a diverse, rotating series of clergy to speak at graduation ceremonies, the Providence public schools made a commendable effort to acknowledge the traditions and beliefs of the families that send their children to the public schools. Such efforts should be welcomed, not condemned, by the courts. Nor should the courts attempt to censor or rewrite such prayers to remove the name of God or to conform to a notion of nondenominationalism or civil religion.

To condemn this graduation ceremony would imperil many other forms of religious expression on public occasions. Prayers at presidential inaugurations, prayers by legislative chaplains, and days of national thanksgiving and prayer would logically come under the same condemnation. This Court's past interpretations of the Establishment Clause leave ample room to allow such focus of religious expression. To the extent that the judicially-created standards in the *Lemon v. Kurtzman* case encourage lower courts to a misguided censorship of such religious expression, and of religious expression generally in the public school arena, the *Lemon* test should be reconsidered.

In advancing this position, *amici* and the families we serve do not ask the judiciary or any branch of government to support or promote our religious beliefs. Quite the contrary. The wellspring of religious faith and practice in America has never been the government, but rather the hearts of the American people and the inspiration of God. We seek from the government nothing more than a level playing field for religious belief vis-a-vis other beliefs.

ARGUMENT

I. THE DECISION BELOW ENFORCES AN EXTREME SEPARATION OF CHURCH AND STATE AT THE EXPENSE OF RELIGIOUS LIBERTY.

The First Amendment enshrines freedom of religion as one of the foremost rights enumerated in the Bill of Rights. In conjunction with the Fourteenth Amendment, the religion clauses of the First Amendment provide that government shall "make no law respecting an establishment of religion, nor abridge the free exercise thereof."

In recent decades, two competing visions of the purpose and nature of the Establishment Clause have battled for the minds and votes of the Justices of this Court. The first vision would interpret the Establishment Clause in tandem with the Free Exercise Clause to promote the common purpose for which they were both enacted. This common purpose is "to secure religious liberty," as Justice O'Connor observed in her concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985).

The second vision would interpret the Establishment Clause to promote not religious liberty, but rather "secular liberty," as espoused by Justice Blackmun and a plurality of the Court in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3111 (1989). This view insists that all levels of government must be completely secularized, *id.* at 3110; judges following out this vision are repeatedly seen attempting to "ferret out religious influences in public life." McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 3. According to this view, the Establishment Clause requires uncompromising enforcement of the "separation of church and state."

The first vision recognizes that the phrase "separation of church and state" is nowhere contained in the Constitution. It maintains that a regime of total separation is neither possible nor desirable. *See Lynch v. Donnelly*, 465

U.S. 668, 672-73 (1984). This vision starts from the historical propositions that America has long been a haven for those seeking religious freedom, that Americans are by and large a "religious people whose institutions presuppose a Supreme Being," and that within certain tolerable limits, government may acknowledge the fact that religious beliefs are widely held among the American people. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

The first vision recognizes that, given the rich religious heritage of the American people, some contacts between government and religious expression are inevitable. *See Lynch v. Donnelly*, 465 U.S. at 672. In light of the extension of the modern state into many aspects of society, any effort to separate religion totally from government would exert a far broader impact than the framers of the First Amendment could have contemplated. The multiple contacts between government and religious expression would become an occasion to suppress religious expression. Thus, given the reality of government today, an extreme version of separation of church and state would work directly contrary to the interests of religious liberty.

Justices of this Court have accordingly warned against "a relentless extirpation of all contact between government and religion." *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. at 3135 (Kennedy, J., concurring in part and dissenting in part). To protect against this danger, the Court has espoused a guiding principle of "accommodation of all faiths and all forms of religious expression, and hostility toward none." *Lynch v. Donnelly*, 465 U.S. at 677.

The lower court decisions in this case follow an extreme version of the separationist view. The district court invoked the separation concept explicitly when it said that "God has been ruled out of public education as an instrument of inspiration or consolation." *Weisman v. Lee*, 728 F. Supp. 68, 70 (D.R.I. 1990). The court of

appeals, apparently sensing nothing improper in a complete separation of the public school arena from any mention of the name of God, praised the district court's decision and adopted it. *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990).

II. THE EXTREME SEPARATION VIEW MAKES PUBLIC SCHOOLS HOSTILE TO RELIGION AND SHOULD THEREFORE BE EMPHATICALLY REJECTED BY THIS COURT.

The extreme separationist view exemplified by the decision below has exerted a powerful influence upon public education. Decisions of courts and school administrators, as described below, have too often followed a harsh rule excluding all forms of religious expression from the public schools. As a result, many religiously inclined Americans who wish to support the public schools as institutions that strengthen a pluralistic democracy, find instead a pattern of censorship, secularized conformity, and hostility toward religion. This negative impact on families and students—who perceive the hostility first-hand—could easily be averted by clear guidance from this Court.

Evidence of public school hostility became abundant and conspicuous in the 1980's. Scholarly studies, judicial opinions, and Congressional hearings have combined to highlight the disturbing truth. In case after case, discrimination against religion has flowed from a misguided and simplistic assumption that all forms of religious expression must be separated from the public school environment. The following facts cry out for a clear pronouncement from the Supreme Court to restore pluralism and religious liberty in place of secularization and extreme separation.

The Congressional hearings on the Equal Access Bill in the mid-1980's led the Senate Committee on the Judiciary to conclude that many public school authorities across the country were suppressing religious speech within the schools and teaching students in effect "that

religious speech is taboo." S. Rep. No. 98-357, 98th Cong., 2d Sess. 12 (1984). The Committee found that "school authorities and organizations are beginning to prohibit students, both individually or in small groups, from engaging in any kind of religious speech at all." *Id.* at 16. The Committee described instances of students being reprimanded for private religious conversations with fellow students, students being prevented from praying together in a car on a school parking lot, and students being forbidden to carry personal Bibles on school property. *Id.* at 11-12. These obviously extreme examples, the Committee explained, resulted primarily from confusion in the minds of school administrators caused by decisions of the lower federal courts. *Id.* at 6.

Students and families quickly perceive the hostility toward religion inherent in such occurrences. As one high school student testified at the Committee's hearings:

> We have been taught that the Constitution guarantees us freedom of speech But we feel that here we have been discriminated against, because we can picket, we can demonstrate, we can curse, we can take God's name in vain, but we cannot voluntarily get together and talk about God on any part of our campus, inside or out of the school.

Id. at 10.

If students receive the impression that religious speech must be relegated to the "secret and clandestine," the Committee observed, free exchange of ideas will suffer, and intolerance toward religion will be fostered. *Id.* at 11-12. Moreover, the Committee found that a separationist view applied to the public schools "effectively denies that there may be a religious solution to many of the issues and problems the students must face" (*id.* at 18) —such as illegal drug use, abortion, violence, suicide, and depression (*id.* at 12). While public schools feel powerless even to acknowledge that there may be a religious dimension to solving such problems, recent studies in-

creasingly show the importance of taking religious beliefs into account when addressing these issues. *See, e.g.*, Larson, Larson, Gartner, *Families, Relationships, and Health*, Behavior and Medicine 135, 140, 143 (D. Wedding ed. 1990). Modern experience confirms George Washington's insightful observation that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." Fitzpatrick, *The Writings of George Washington from the Original Manuscript Sources 1745-1799 Farewell Address*, at 214, 229.

The concerns of the Senate Judiciary Committee appear all the more compelling when considered in light of the self-defined mission of the public schools. John Dewey, widely known for his impact (for better or worse) on American public education in this century, wrote that the public schools should "see to it that each individual gets an opportunity to escape from the limitations of the social group in which he was born, and to come into living contact with a broader environment." J. Dewey, *Democracy and Education* 24 (1916). America's public schools have long embraced a goal of bringing together children from families representing a wide diversity of faiths, philosophies, and ethnic heritage, and exposing them to different cultures and beliefs. In such an environment, an approach that censors and systematically excludes one particular viewpoint is anything but pluralistic. The result is hostility and secularism, not pluralism, when students are exposed to every possible belief, viewpoint, and behavior pattern—except those related to religious belief. The district court in this case admitted the hostile impact of its own decision, as students "might conclude that a deity is not an important part of their lives." 728 F. Supp. at 72 n.7.

The policy of forced exposure to non-religious views has been militantly enforced by the courts. Thus, there is no protection from exposure to views that are objectionable to a religiously oriented family. *See Mozert v.*

Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987). One federal court has stated the rule explicitly that under the Constitution there is "no legitimate interest in protecting any or all religions from views distasteful to them." *Cornwell v. State Board of Education*, 314 F. Supp. 340, 344 (D. Md. 1969), *affirmed*, 428 F.2d 471 (4th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970). Viewed in this context, occasional exposure of public school students to religious beliefs of others will only balance the scales and present a fuller range of Dewey's "broader environment."

The separationist notion that religious speech is taboo in public schools has also led to artificial distortions of public school curriculum materials. A study by Dr. Paul C. Vitz under the auspices of the National Institute of Education documented the extreme lengths to which public school textbook publishers have gone to de-emphasize the role of religion in American life. *See* Vitz, *Religion and Traditional Values in Public School Textbooks*, The Public Interest 79-87 (Summer 1986) (reporting findings of NIE study). The result has been such ridiculous acts of anti-religious censorship as the substitution of "thank goodness" for the phrase "thank God" in a story (by Isaac Bashevis Singer) about a Jewish boy in eastern Europe (*id.* at 87) and the definition of pilgrims as "people who make long trips." *Id.* at 81. Dr. Vitz concluded, after reviewing the most widely used elementary school readers and social science texts, that the texts overwhelmingly exclude any reference to Jewish or Christian religion as a part of contemporary American life. *Id.* at 80, 86.

The solution to these problems is not government propagation of religion, but rather tolerance, openness, and true pluralism. The religion clauses of the First Amendment allow ample room both for acknowledgement of the religious values that exist among American families and for an openness to religious expression by non-government speakers within the public sphere.

The extreme separationist view, on the other hand, would make public schools into a hostile environment for a broad spectrum of American families. Families that want to pass on religious beliefs and values to their children face an uphill battle against their own government's institutions. Religiously inclined students and families confront the clear message that they are outsiders. Even the honestly inquisitive non-believing family, which merely wants children to experience the diversity and richness of cultural traditions in America, is deprived of this goal through government censorship of the religious aspects of that cultural diversity.

The hostility described above, however, is by no means required by this Court's decisions. The Court has acknowledged that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Everson v. Board of Education*, 330 U.S. 1, 18 (1947). The Court's decision in the Pittsburgh creche and menorah case in 1989 explained that the decision "does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires." *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. at 3111.

This Court has upheld some measures aimed at ameliorating the hostility of the public schools toward religious expression. In *Board of Education of Westside Community Schools v. Mergens*, 110 S. Ct. 2356 (1990), the Court upheld the Equal Access Act, which sought to remedy some part of the hostility toward religious speech described in the Senate Judiciary Committee's report. The *Mergens* Court aptly observed that "the Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." 110 S. Ct. at 2371 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641

(1978) (Brennan, J., concurring in judgment)). Earlier, in the case of *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court upheld "release-time" programs for public school students for purposes of religious instruction off-campus. These decisions state the principle that should be the rule rather than the exception in the public schools: pluralism that allows room for religious expression by individuals and acknowledgement by schools of the religious heritage that is part of the cultural diversity of the American people. The contrary rule of extreme separation, as exemplified by the decisions below in this case, would make a mockery of pluralism by excluding from the public square anyone who takes religious belief seriously.

III. THE COURT SHOULD RESTORE BALANCE TO PUBLIC SCHOOLS BY ALLOWING FORMS OF RELIGIOUS EXPRESSION THAT NEITHER COERCE STUDENTS NOR OTHERWISE TEND TOWARD AN ESTABLISHMENT OF RELIGION.

This case provides the Court an opportunity to restore balance to the public schools with respect to religious expression. First, the Court should forthrightly reject the extreme separationist notion that all forms of religious expression must be excluded from the public schools. Second, the Court should allow those forms of religious expression that do not coerce students and that do not tend toward an establishment of religion. To the extent that the Court's three-part test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) has encouraged lower courts to strike down government measures that afford even-handed treatment to religious and nonreligious expression, that test should be reconsidered.

By any reasonable standard, the decision below should be reversed. The record shows a balanced approach by the Providence schools to present a wide variety of speakers for invocations and benedictions at graduation ceremonies (Respondent's Appendix A4-7). The prayers in

question are not composed, selected, or approved by government officials. *Cf. Lincoln v. Page*, 241 A.2d 799, 800 (N.H. 1968) (allowing invocations at town meetings). Accommodation of minority faiths is evident from the fact that the speaker in this case, Rabbi Gutterman, was representative of a relatively small religious minority in Rhode Island (*see* First National Survey of Religious Identifications of Americans, The Graduate School and University Center of the City University of New York (1991) (Religious Composition of State Populations 1990 indicates 1.6% of Rhode Island population are Jewish)).

Finally, the Court should reject any role for courts or other government officials in censoring or rewriting the religious content of prayers on public occasions, as the district court in this case suggested by redrafting the prayers to exclude the name of God (728 F. Supp. at 74-75 & n.10), and as the Sixth Circuit proposed in *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1410 (6th Cir. 1987) (requiring that prayers at public school graduations be "nondenominational"). Any attempt by government authorities to define a type of "permissible" religious content for prayer truly would tend to establish a favored brand of religion, even if that brand is soothingly labeled "nondenominational."

IV. FAILURE TO REVERSE THE DECISION BELOW WOULD JEOPARDIZE OTHER LONGSTANDING FORMS OF PUBLIC RELIGIOUS EXPRESSION.

If religious expression by a guest speaker at a graduation ceremony is prohibited by the Establishment Clause, there is no principled way to uphold the numerous other forms of public religious expression that have long been a part of the American scene. Prayers at presidential inaugurations, prayers by legislative chaplains, the inclusion of "under God" in the Pledge of Allegiance, and days of national thanksgiving and prayer are certainly not *less* offensive to an extreme separationist vision than the

prayers in this case. In many instances, these other forms of religious expression will be heard or read by school-age children—who will probably not have the protective influence of family members who are typically present at public school graduation ceremonies.

CONCLUSION

This case is a fitting occasion for the Court to affirm Justice O'Connor's admonition in the recent Pittsburgh creche and menorah case:

> The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgement of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion.

County of Allegheny v. American Civil Liberties Union, 109 S. Ct. at 3117 (O'Connor, J., concurring).

Part II of this brief illustrates the vital importance of applying this principle in a balanced way to the public schools. By applying the principle to this case, the Court can do much to restore the credibility of the public schools as promoters of diversity and pluralism, rather than instruments of secularization. The decision of the court of appeals should therefore be reversed.

Respectfully submitted,

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